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Brown's Shoe Fit Co., Tom Brown, Brown's General Offices v. Jon Olch, Janet Olch, Henry Sigg, 330 Main Street Partners : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

BROWN'S SHOE FIT CO., an Iowa partnership; TOM BROWN; and BROWN'S GENERAL OFFICES, an Iowa corporation, Plaintiffs/Appellants -vs- JON OLCH, JANET OLCH, HENRY SIGG and 330 MAIN STREET PARTNERS, Defendants/Appellees.	)	APPELLEES' BRIEF Case No. 970199-CA (Priority 15)

APPEAL FROM THE THIRD JUDICIAL DISTRICT

COURT, SUMMIT COUNTY, JUDGE PAT B. BRIAN

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BROWN'S SHOE FIT CO., an Iowa partnership; TOM BROWN; and BROWN'S GENERAL OFFICES, an Iowa corporation, Plaintiffs/Appellants -vs- JON OLCH, JANET OLCH, HENRY SIGG and 330 MAIN STREET PARTNERS, Defendants/Appellees	APPELLEES' BRIEF
JON OLCH, JANET OLCH, HENRY SIGG and 330 MAIN STREET PARTNERS, Counterclaimants, -vs- BROWN'S SHOE FIT CO., an Iowa partnership; BROWN'S SHOE FIT CO., an Iowa corporation; TOM BROWN; BROWN'S GENERAL OFFICES, an Iowa corporation; and JOHN DOES 2-5, Counterdefendants.	Case No. 970199-CA (Priority 15)

I.

JURISDICTION

This court has jurisdiction to hear this appeal pursuant to Utah Code Annotated § 78-2(a)-3(2)(j).

II.

ISSUES PRESENTED FOR REVIEW ON CROSS APPEAL

1. Did the district court commit error in dismissing 330 Partners' Counterclaim for abuse of process where there was substantial evidence that Brown's commenced this action for an improper purpose, knowing it would not have agreed to lease the Property under the terms of the Basic Lease Provisions document which Brown's claims was breached by 330 Partners? [Preservation in Record: R. 1125, 1319-25].

III.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

None.

IV.

STATEMENT OF THE CASE

A. Course of Proceedings.

Appellants Brown Shoe Fit Company, Tom Brown and Brown's General Office (hereinafter collectively referred to as "Brown's") commenced this action seeking to enforce as a binding lease agreement a one-page document entitled "Basic Lease Provisions" that did not contain all of the basic terms of a lease and expressly contemplated that the parties would attempt to negotiate a final lease for Brown's Shoe Fit Company to lease the premises located at 340 Main Street, Park City, Utah from Defendant 330 Main Street Partners ("330 Partners").[1] Brown's sought specific performance or, in the alternative, damages. Brown's also asserted a purported claim for fraud. Defendants 330 Partners, Jon Olch, Janet Olch and Henry Sigg filed a Counterclaim for abuse of process and fraud.

The trial was scheduled for June 11, 1996. On June 6, 1996, a hearing was held before Judge Pat B. Brian to discuss the issues that would be decided by the court and the issues that would be decided by the jury. [R. 1543]. At that time, Judge Brian determined to hold a hearing at the commencement of trial on June 11, 1996 to argue and decide various legal matters, including whether Plaintiffs' claims should go to the jury or be decided by

[1] The street address of the property was originally thought to be 330 Main Street. Hence the name 330 Main Street Partners.

the court and whether there were any disputed material facts concerning those claims that had to be tried. [R. 1568-70]. Both sides understood that the hearing on June 11, 1996 would effectively be a summary judgment hearing. [R. 1558-70].

At the commencement of trial on June 11, 1996, Judge Brian held a hearing on the legal issues. After substantial argument, Judge Brian dismissed with prejudice Brown's specific performance claim, its fraud claim and its claims for breach of contract to the extent of the two three-year option periods referenced in the Basic Lease Provisions. Judge Brian reserved on the issue of whether the Basic Lease Provisions was an enforceable agreement for the initial three year term and ruled he would submit that issue to the jury. [R. 1345, 1426].

After a recess, Brown's stipulated that the breach of contract claim for the initial three-year term of the lease could also be dismissed with prejudice because it was Brown's position that if it only had the initial three-year term of the lease it would lose money. Under the stipulation, if Brown's were to be successful on this appeal in overturning Judge Brian's dismissal of the breach of contract claim as to the option periods, Brown's could refile the breach of contract claim as to the initial three-year term. [R. 1267-69]. Judge Brian also dismissed Defendants' Counterclaim for abuse of process and fraud.

Thereafter, in October and November, 1996, extensive hearings were held on the Findings of Fact and Conclusions of Law, which were entered by the court, together with an Order of Dismissal, on December 12, 1996. Brown's filed a Notice of Appeal

on December 12, 1996. 330 Partners filed a Notice of Cross Appeal of the court's dismissal of the abuse of process Counterclaim on December 18, 1996. [R. 1432, 1438].

B. Statement of Facts.

1. 330 Partners is a general partnership organized and existing under the laws of the State of Utah. Defendants Jon Olch, Janet Olch and Henry Sigg are partners in that partnership. [R. 983-84].

2. Appellant Brown's Shoe Fit Company is a purported partnership organized to operate a shoe store in Park City, Utah. [R. 1419].[2]

3. Appellants Tom Brown and Brown's General Offices purport to be two partners in the partnership. [R. 1419].

4. Prior to March, 1989, Tom Brown engaged in certain preliminary discussions with Henry Sigg for Mr. Brown to lease the Property from 330 Partners for the operation of a Brown's Shoe Fit store. [R. 250, 493].

5. On March 18, 1984, Brown's Shoe Fit, Tom Brown and 330 Partners executed a document entitled "Basic Lease Provisions" (the "BLP") setting forth certain terms the parties had agreed to as part of the negotiations for a lease of the Property. The BLP provided for an initial three-year term and then two three-year

---

[2] At the time the Basic Lease Provisions document was signed, Tom Brown and Brown's General Offices intended to solicit certain third parties to become partners in the partnership, but no partners ever invested. [R. 866-67, 869].

option periods. The BLP provided for a basic rent per square foot and for a percentage rent based upon "gross volume." The BLP contained a square footage rate for the option periods, but did not contain an agreed upon percentage rent for the option periods. Instead, the BLP specifically provided that prior to the commencement of each option period the parties would "agree on the gross volume figure from which to base additional rent during each year" of that option period. [R. 67]. Finally, the BLP specifically provided that the terms agreed upon therein were "to be incorporated into a final lease document executed by both parties." [R. 67].

6. Tom Brown's intent when he signed the BLP was "[t]o firm up and have a written document reflecting the negotiations up to this point." Mr. Brown acknowledged that further negotiations were contemplated and that he considered the BLP to be an agreement to be incorporated into a future lease. [R. 874, 878-79].

7. On March 28, 1994, ten days after the BLP was signed, Tom Brown sent a memo to prospective partners in the Park City store in which he stated:

> There is still a lot of things that have to be worked out with the landlord, but it looks like it is going to be a go.

Mr. Brown acknowledged that one of the things that had to be worked out with the landlord was a final lease agreement. [R. 867-68].

8. The BLP contained conflicting provisions about whether there would be a cost of living increase during the first option period. Moreover, the document did not provide which cost of living index would apply during either option period. [R. 67].

9. The BLP did not contain a lease commencement date. [R. 67].

10. At the time the BLP was signed on March 18, 1994, no building existed on the Property. In fact, construction had not even been commenced, no governmental approvals had been obtained and final plans for the building had not been completed. [R. 791].

11. Architectural plans for the building were not completed until on or about June 20, 1994. The plans were submitted to the Park City Planning Staff on or about June 29, 1994. A building permit application was filed September 23, 1994. [R. 791].

12. A construction contract for the construction of the building was signed November 18, 1994. Park City issued a ground breaking permit on November 20, 1994, a footings and foundation permit on December 19, 1994 and a full building permit on March 16, 1995. [R. 791-92].

13. Construction of the building on the Property commenced in November, 1994. Construction was completed in December, 1995, a full 21 months after the BLP was executed. A Temporary Certificate of Occupancy was issued on December 22, 1995. [R. 792].

14. On August 5, 1994, Jon Olch sent a letter to Tom Brown, stating his position that the BLP was not a binding agreement, but indicating a willingness to attempt to work out an agreeable lease with Brown's. [R. 882].

15. By letter dated August 12, 1994, Brown's attorney, Thomas D. Green, wrote Jon Olch disagreeing that the BLP was not

a binding document, but indicating a willingness to work out a lease agreement for the Property. [R.885].

16. During the fall of 1994 and early 1995, the parties exchanged correspondence and drafts of lease agreements for the Property, but no final lease agreement was ever agreed to by the parties. [R. 80-83, 45-66, 1-14].

17. Brown's attorney, Thomas Green, reviewed the Defendants' original proposed lease on behalf of Brown's. By letter dated October 27, 1994, he demanded over thirty changes in the proposed lease. Tom Brown testified that Brown's would not sign the lease unless all of the changes demanded in that letter were made. [R. 82, 39-44, 875].

18. The parties did not agree on a number of important provisions to be included in the lease, including:

(a) The lease commencement date;

(b) Whether Brown's should be limited to the operation of a shoe store on the premises or whether Brown's should be entitled to sell other clothing apparel;

(c) Whether 330 Partners should be prohibited from leasing other space in the building to a tenant selling the same type of items;

(d) What the definition of what "gross sales" should be;

(e) Whether Brown's should be prohibited from assigning or subletting the Property;

(f) What insurance Brown's should be required to carry;

(g) What the parties' rights would be in the event of condemnation;

(h) Whether Brown's should be required to put up a letter of credit to secure one year's rent or whether Brown's should only be required to put up a two month security deposit; and

(i) What Brown's obligations would be in the event of default. [R. 1-67].

19. Most importantly, as stated above, the parties did not agree in the BLP on what the gross volume threshold for calculating percentage rent during the option periods would be. Despite the fact that the BLP provided that the parties would agree on the gross volume threshold prior to the commencement of each option term, Brown's attempted to require 330 Partners to agree on that threshold before Brown's would sign a lease. On the other hand, 330 Partners simply proposed in accordance with the specific language of the BLP that the threshold would be agreed to prior to commencement of the first and second option periods. Brown's also sought a provision designed to insure that the rent during the option periods would not exceed then current fair rental value of the Property. 330 Partners took the position that the rent during the option periods would be higher to compensate it for the lower than market rental rate during the initial term. Brown's expert conceded that is an appropriate goal for a landlord. [R. 882-84, 887, 945-46, 947-952, 962-64].

20. Brown's was unwilling to lease the Property if all it had was a binding agreement for a three-year lease. Brown's

required a final binding agreement for two three-year option periods in order to lease the Property. [R. 925-27]. At the hearing at the commencement of trial on June 11, 1996, Brown's stipulated that the following testimony of Tom Brown was true and accurately reflected Brown's position:

> Q. So I take it that at the end of the day you were prepared to sign a lease if all the term was, was three years, no options; is that true?
> A. No.
> Q. In order to sign a lease you required at least two option periods of three years each?
> A. Yes.
> Page 57, MR. VAN DAM: Go ahead.
> Line 4, THE WITNESS: No, I wouldn't have done it strictly on three years.
> Q. (BY MR. BURBIDGE) I just ask, why not?
> A. Because if you need to depreciate your items and this sort of thing, you don't even get a run at it in three years.
> Q. So you would end up losing money?
> A. Losing money. [R. 1422].

21. Brown's conceded that many of the provisions on which the parties disagreed were simply normal negotiating items upon which the parties could reasonably take different positions. [R. 917-44, 964-81].

22. Brown's expert, Richard A. Robbins, opined that the BLP was a typical letter of interest which parties use to attempt to obtain financing and that 50% of the time such documents never result in a final agreement between the parties. [R. 958-59, 961].

23. On October 8, 1993, some months prior to execution of the BLP, Tom Brown sent a letter to Henry Sigg indicating an interest in leasing the Property. Mr. Brown understood Sigg would use that letter for financing purposes. No one told Mr. Brown that 330 Partners would not use the BLP to assist in obtaining financing. [R. 876-77, 991].

V.

SUMMARY OF ARGUMENT

1. The parties did not intend to be bound by the BLP, which expressly provided that the terms set forth therein would be incorporated in a final lease agreement. Both parties intended that unless and until a final lease was negotiated that no agreement existed. The parties were unable to agree upon a final lease. Brown's attorney demanded over thirty changes in the proposed lease submitted by 330 Partners. Tom Brown testified he would not sign a lease unless all of those changes were made.

2. Regardless of the parties' intent, the BLP is not enforceable because it is too uncertain and indefinite to be enforced. There are numerous terms to which the parties did not agree. Most importantly, the parties did not agree to the rent during the two option terms. Under Utah law, the failure to agree on such rent is fatal to any agreement.

3. The BLP did not obligate 330 Partners to negotiate a lease in good faith. There is no such provision in the BLP nor should such an agreement be implied by the court.

4. Even if a covenant of good faith and fair dealing is implied into the BLP, 330 Partners did, in fact, attempt to negotiate a lease in good faith, but the parties were unable to agree on a number of terms. Brown's conceded that many of the items were normal disagreements between a landlord and tenant.

5. Brown's suffered no damages as a result of 330 Partners' alleged failure to negotiate in good faith. Brown's did

not intend to perform the BLP. Brown's was only willing to lease the Property if the rental for the two option periods was agreed to in advance, an agreement which 330 Partners was not obligated to make under the BLP.

6. The trial court properly dismissed Brown's claims for specific performance. The BLP was far too indefinite and uncertain to be the subject of specific performance. Further, Brown's did not join the present tenants on the Property who were indispensable parties.

7. The trial court correctly dismissed Brown's General Offices' claim to recover money it allegedly would have earned under a management agreement with Brown's Shoe Fit. This item of special damage was not pled in the Complaint. Nor was Brown's General Offices a third party beneficiary of the BLP. And, Brown's General Offices was not a party to the agreement, but was simply a partner in Brown's Shoe Fit, which signed the BLP.

8. The court properly determined that the facts set forth in Finding No. 12 were undisputed based upon the record before the court, including the undisputed documents attached to Brown's Complaint and the deposition testimony of Tom Brown and his attorney, Thomas Green.

9. The court properly dismissed Brown's fraud claim. There was no misrepresentation of a presently existing fact because there was no evidence that 330 Partners did not intend to attempt to negotiate a final lease incorporating the terms of the BLP. Further, because the terms of the BLP were so vague, uncertain and incomplete, Brown's could not have reasonably relied upon that

document. Brown's further could not have reasonably relied upon the document because it did not intend to comply with its terms. And, Brown's was not damaged by any supposed misrepresentation because it did not intend to perform the BLP unless Brown's could negotiate an agreement for the amount of rent to be paid during the two option periods. The BLP did not obligate 330 Partners to make such an agreement, but only provided that the parties would negotiate the amount of rent during the option periods prior to the commencement of each option period.

10. The trial court erred in dismissing 330 Partners' Counterclaim for abuse of process. There was substantial evidence that Brown's filed this action for damages or specific performance with respect to the BLP knowing that Brown's would not perform the BLP in order to attempt to exact a lease from 330 Partners to which 330 Partners was not obligated to agree or to force 330 Partners to pay Brown's money to settle the lawsuit.

VI.

ARGUMENT

A. THE BLP DID NOT CONSTITUTE A BINDING AGREEMENT, BUT WAS SIMPLY PART OF THE PRELIMINARY NEGOTIATIONS BETWEEN THE PARTIES AND IS TOO UNCERTAIN TO BE ENFORCED.

1. The Parties Did Not Intend the BLP To Be a Binding Lease.

Brown's attempted to elevate the BLP signed by Tom Brown

and Henry Sigg on March 19, 1994 to the status of a binding lease agreement between the parties. This assertion is without merit as a matter of law. Not only is this position inconsistent with the legal authorities, but it is inconsistent with the testimony of Tom Brown and Brown's expert, Richard A. Robbins.

The cases are uniform that if the parties do not intend to be bound until a final agreement is prepared and signed, no agreement exists until that is accomplished. See, e.g., Arnold Palmer Golf Co. v. Fuqua Industries, Inc., 541 F.2d 584, 587 (6th Cir. 1976); Itek Corporation v. Chicago Aerial Industries, Inc., 248 A.2d 625, 629 (Del. 1968); Scheck v. Francis, 260 N.E.2d 493, 494 (N.Y. 1970).

This Court's decision in Crismon v. Western Co. of North America, 742 P.2d 1219 (Utah App. 1987), is directly on point. In Crismon, the tenant sent a letter to the landlord dated January 11, 1982 confirming an agreement that the tenant would enter into a lease agreement on five duplexes for a five-year term with lease payments of $540.00 per unit per month with a 6% annual escalation clause and that the landlord would be responsible for basic maintenance and management of the units. The tenant stated that its legal department would prepare a lease based upon the general agreements the parties had reached.

Shortly thereafter, the tenant began paying rent on two units, the construction of which had been completed. The landlord then wrote the tenant stating that the terms contained in the tenant's letter were acceptable with certain modifications and

asking that the tenant respond to the proposed modifications so that the parties could "proceed toward a final agreement." The parties then exchanged drafts of a final lease agreement, but never agreed to all of the terms.

The trial court held that the tenant's January 11, 1982 letter did not constitute a binding commitment to lease, but simply set forth the preliminary terms and that the landlord and tenant had rejected each other's proposed lease. This Court affirmed, stating:

> In this case, the language in Epps' January 11 letter indicates that the parties were still negotiating. The letter states that Western's legal department would be sending a prepared lease. That statement indicates that both parties understood that a binding contract would be entered into in the future. Subsequent correspondence between the parties also demonstrates that the January 11 letter evidenced preliminary negotiations. . . . Finally, the subsequent leases exchanged by the parties demonstrate that there was no meeting of the minds. Epps sent Crismon a lease which Crismon rejected by sending back a lease with different terms with regard to term, rent, maintenance, insurance and default. The parties' exchange of proposed leases clearly demonstrates that they did not have a meeting of the minds as to all of the essential terms of the lease.

[742 P.2d at 1222].

The facts of Crismon mirror those in the present case. The BLP itself specifically states that the terms agreed upon therein are "to be incorporated into a final lease document executed by both parties." The BLP does not come close to containing all of the essential terms of a long-term commercial lease. Tom Brown testified his intent in signing the BLP was "[t]o firm up and have a written document reflecting the negotiations up to this point."

He acknowledged further negotiations were necessary. [R. 874, 878-79]. Ten days after the BLP was signed, Tom Brown told his prospective partners that there were still a number of terms that had to be worked out with 330 Partners, but it looked like it "would be a go." [R. 867-68, 881].

The subsequent negotiations which took place between the parties months later in which they could not agree on any number of terms demonstrate the lack of an agreement. Brown's attorney in his October 27, 1994 demanded over thirty changes in the lease proposed by 330 Partners. And, Tom Brown very plainly testified in his deposition that he would not sign the lease unless all of the changes demanded in that letter were made. [R. 82, 39-44, 875].

There were a number of items the parties were not able to agree upon in negotiations. Most importantly, there was absolutely no agreement on the percentage rent which would be paid by Brown's during the first and second option periods, nor was there any mechanism agreed to for determining that rent. Instead, the parties simply provided that prior to the commencement of each option term, the parties would agree on the percentage rent for that option term. Tom Brown specifically testified that he would not lease the Property unless he had a binding agreement to lease for the two three-year option periods because otherwise he would end up losing money. [R. 1422]. One of the demands made by Brown's attorney in the negotiations was that, contrary to the specific provisions of the BLP, 330 Partners agree in advance as

part of the initial lease what the percentage rent would be during the option periods or agree that if the parties could not agree on the rent it would be established by appraisers. Brown's attorney testified that unless that item was agreed to, he would not recommend his clients sign a lease. The attorney acknowledged there was no provision in the BLP obligating 330 Partners to agree on the percentage rent during the option periods. [R. 925-27].

Other terms the parties were unable to agree upon as part of the lease negotiations included the lease commencement date, what business Brown's would be entitled to conduct on the Property, whether other tenants would be prohibited from selling similar items as sold by Brown's, whether Brown's could only conduct a shoe store or could sell other clothing items, whether there would be costs of living escalations during the first option term, which cost of living index would be utilized to calculate cost of living increases, the definition of "gross sales" from which percentage rent would be calculated, the amount of insurance which would be required, Brown's right to assign or sublease, the rights of the parties in case of the exercise of eminent domain rights, and Brown's obligations in case of default.

It is patently obvious from the foregoing facts, including Brown's own testimony, that the parties did not intend to be bound by the BLP unless and until they reached a final, binding lease

agreement containing numerous additional terms.[3] Indeed, Richard R. Robbins, the expert retained by Brown's, testified that the BLP was a typical letter of intent which parties use to attempt to obtain financing and that 50% of the time such documents never result in a final agreement between the parties. [R. 958-59, 961].

2. Regardless of the Parties' Intent, the BLP Is Not an Enforceable Lease.

The lease contemplated by the parties was for a period of more than one year. Therefore, the lease was required to be in writing under the statute of frauds. Utah Code Annotated § 25-5-1. In order for a memorandum to satisfy the statute of frauds, it must contain all of the essential provisions and terms of the agreement. English v. Standard Optical Co., 814 P.2d 613, 616 (Utah App. 1991). To be enforced, the memorandum must also set forth the obligations of the parties with sufficient definiteness. Southlands Corp. v. Potter, 760 P.2d 320, 322 (Utah App. 1988).

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[3] Brown's argues that when Judge Noel denied 330 Partners' Motion for Summary Judgment prior to the completion of discovery, he "explicitly ruled the parties' intended 'to be bound' by the" BLP. [Appellants Brief, p. 14, n.3]. Brown's concludes without any support whatsoever that this establishes the law of the case. This contention is wrong. Initially, Brown's relies for this contention solely upon the contents of an unsigned minute entry prepared by the clerk. Neither the proposed order prepared by 330 Partners, nor the proposed order prepared by Brown's contains such a ruling. The court did not sign either order. Thus, no such ruling exists. See, South Salt Lake v. Burton, 718 P.2d 405 (Utah 1986); State v. Rawlings, 829 P.2d 150, 153 (Utah App. 1992). Moreover, a determination made by one judge denying a motion for summary judgment does not establish the law of the case prohibiting a second judge from revising the prior ruling. AMS Salt Industries, Inc. v. Magnesium Corp. of America, 320 Utah Ad. Rep. 3, 4 (Filed June 24, 1997); Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah App. 1994). And, the denial of a motion without findings or a statement of grounds does not establish law of the case. Govert Copier Painting v. Van Leeuwen, 801 P.2d 163, 167-68 (Utah App. 1990). In point of fact, significant discovery followed the initial motion for summary judgment, and Judge Brian was presented with a substantially different record.

Even if it is assumed for purposes of argument, contrary to what is demonstrated above, that the parties intended the BLP to be a binding lease, that document is unenforceable as a matter of law at the very least because it does not contain a lease commencement date and, more importantly, an agreement on the amount of rent to be paid during the first and second option periods.

First, there is no lease commencement date set forth in the BLP nor is there any method set to determine when the lease would commence. There is not even any provision obligating 330 Partners to complete construction of the building at any specified date. Certainly, if Brown's Shoe were on the other foot, it would argue that it could not be bound to a lease for a non-existent building to commence some unspecified time in the future after the landlord prepared plans for a building, obtained governmental approvals and actually completed construction.

Second, as previously explained, the BLP did not specify the percentage rental that Brown's would be obligated to pay during the option periods or any mechanism for determining the percentage rental. Thus, the rent that Brown's would pay during the option periods was left for future agreement. At most, the BLP was an agreement to agree in the future.

Utah law is settled beyond dispute that an option to renew a lease is unenforceable unless the rent to be paid, or some mechanism for determining the amount of rent, is specified in the lease. Thus, in Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976), the lessee had an option to renew a lease

at a rate to be determined based upon specific factors. The parties were not able to agree on the amount of rent for the option period. The Utah Supreme Court held that because there was no agreement between the parties on the rental rate for the renewal term, the lease terminated, explaining:

> The majority rule, in essence, is that a provision for the extension or renewal of a lease must specify the time the lease is to extend and the rate of rent to be paid with such a degree of certainty and definiteness that nothing is left to future determination. If it falls short of this requirement, it is not enforceable. . . .
> . . .
> In the current matter, the court implied the parties had agreed on a reasonable rental figure, which the court proceeded to determine. This interpretation had the effect of nullifying the express factors specified by the parties, and substituting a new agreement to which the parties had not committed themselves. To attempt by judicial fiat to substitute the legal concept of "reasonable rental" in lieu of the previously followed design of a fluctuating rental, measured by future uncontrolled and uncontrollable conditions, would, indeed, be to remake the contract for the parties and very possibly frustrate what to us appears to be a very important contrary intent concerning the rental amount. . . . The option to renew was too vague and indefinite to be enforceable and the lease terminated by its own terms as of September 30, 1974. [Emphasis added].

[558 P.2d at 1321].

Brown's attempts to distinguish Pingree on the basis that Brown's would have presented evidence of a later oral agreement made after the BLP was signed that rent during the option terms would be based on fair market value. There was no such contention made by Brown's until months after its claims were dismissed when the parties were arguing over the findings. Nor was there any evidence to support this contention. In fact, 330 Partners'

position was that it was entitled to charge higher rent during the option periods to offset the less than market rent during the initial three-year term. [R. 883]. Moreover, the purported oral agreement would be barred by the statute of frauds.

Finally, this purported distinction was rejected by the Utah Supreme Court in the later case of Cottonwood Mall Co. v. Sine, 767 P.2d 499 (Utah 1988). In Cottonwood Mall, the tenant attempted to enforce an alleged oral agreement by the landlord to renew a lease "upon reasonable terms." The Utah Supreme Court refused to do so, and held that the oral agreement on renewal was unenforceable, stating:

> We held [in Pingree] that the option to renew was too vague and indefinite to be enforceable and that the lease terminated at the end of the original term. . . . In so ruling, this court followed what was termed the majority rule . . . which was stated to be that a provision for the extension or renewal of a lease must specify the time the lease is to extend and the rate of rent to be paid with such a degree of certainty and definiteness that nothing is left to future determination. If it falls short of this requirement, it is not enforceable. . . . In reversing the trial court, this Court expressly rejected its attempt to fix a reasonable rent for the parties when their negotiations bogged down.
>
> Defendant would have us now do what we refused to do in Pingree. While it is true that defendant adduced evidence as to what would be a reasonable renewal term and what would be a reasonable rent, the trial court properly spurned defendant's invitation to find or make an agreement where the parties had themselves failed. Defendants argue that in Pingree the court declined to fix a renewal rent because of the difficulty in balancing the several factors which the lease required the parties to consider in fixing the rent. Here, defendant's argument continues, no factors are listed in the lease, and the task is less complicated. We do not agree. In determining what is "reasonable rent," many factors must be weighed and put into the equation. Business judgments must be made. . . . Courts simply are not equipped to make

> monetary decisions impacted by the fluctuating commercial world and are even less prepared to impose paternalistic agreements on litigants.

[767 P.2d at 502].

In the recent case of Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368 (Utah 1996), the Utah Supreme Court reaffirmed continued vitality of the principles set forth in Pingree and Cottonwood Mall. In Tsern, the parties to a lease traded proposals for a rent abatement because an elevator in the leased premises was inoperable. The trial court found that although the parties had not agreed on the amount of an abatement, it could fix a reasonable amount because the parties had agreed to the concept of rent abatement. The Supreme Court reversed, stating:

> Tsern argues that the trial court erred in supplying a requisite term of the proposed modification. We agree. . . . The only issue, given the trial court's findings, is whether the parties agreed on each of the necessary elements of a valid modification. We hold that they did not.
>
> Courts may not impose a modification of a lease to which the parties have not agreed and, a fortiori, may not do so when the parties have explicitly disagreed as to the essential terms thereof. A valid modification of a contract or lease requires "a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness." Modification of such terms as the amount of rent must be agreed upon in a modification of a lease agreement. As Corbin notes, when parties have not agreed on a reasonable price or a method for determining one, "the agreement is too indefinite and uncertain for enforcement." . . . Barton and Tsern did not agree as to the amount of the abatement, either expressly or impliedly.

[928 P.2d at 373-74] [Citations omitted] [Emphasis added].

The Utah Supreme Court has repeatedly held agreements to agree unenforceable in other contexts besides leases. Thus, in

Harmon v. Greenwood, 596 P.2d 636, 639 (Utah 1979), the Court stated:

> The Letter of Intent quoted above is not by itself an enforceable contract. Nowhere in its forms are any binding promises even made; it is precisely what it purports to be, a letter indicating the intention of the parties to enter into, at a later time, a binding agreement. The letter is a variation of what is often called a "agreement to agree". Such "agreements to agree" are generally unenforceable because they leave open material terms for future consideration and the courts cannot create these terms for the parties. Here the parties simply committed themselves to the intention of entering into an agreement at a later time. The letter set out certain goals of that later agreement, including the formation of a corporation. But the letter itself is not a binding agreement to create any business entity jointly owned by the parties, and indeed, even if it could be so construed, it is woefully lacking in the requisite specificity required for judicial enforcement. As we stated in Valcarce, ". . . where there was simply some nebulous notion in the air that a contract might be entered in the future, the court cannot fabricate the kind of contract the parties ought to have made and enforce it." [Emphasis added].

See also, Oil Shale Corporation v. Larson, 438 P.2d 540-541 (Utah 1968); Valcarce v. Bitters, 362 P.2d 427, 428 (Utah 1961).

Brown's cites a number of cases to attempt to escape these controlling decisions of the Utah Supreme Court. None of Brown's cases are on point.

For example, Brown's cites Ferris v. Jennings, 595 P.2d 857 (Utah 1979). In that case, plaintiff had orally agreed to purchase a house for the defendant and sell it to her within a few months for $6,500.00 plus a "fair commission." Plaintiff admitted the oral agreement had been made. The Court held this agreement was enforceable because the purchase price for the house was definitely

stated to be $6,500.00 and where the "main subject matter of a contract is definite, an agreement for fixing reasonable compensation for some adjunctive service in connection therewith does not render the contract so indefinite as to be unenforceable." [595 P.2d 859]. The Court held the plaintiff had breached the agreement by refusing to even state to defendant what he would accept as a fair commission. Ferris did not involve either a lease or the enforceability of a renewal provision. The case was also decided several years before the Utah Supreme Court's decision in Cottonwood Mall, in which the Supreme Court again made it abundantly clear that a court will not determine for the parties a reasonable rental rate during a renewal period. In addition, unlike Ferris, there was no agreement in the case at bar that the rental rate during the renewal period would be "fair" or "reasonable."

Brown's also mistakenly relies on Reed v. Alvey, 610 P.2d 1374 (Utah 1980). In that case, the parties entered into an earnest money agreement for the sale of real estate for the sum of $70,000.00, which would be payable "upon terms to be arranged." The court held that this agreement was enforceable because where there are no terms of payment set forth in the agreement, the law supplies the missing term by implying that the payment is due in full at the time of tender of the conveyance. [610 P.2d at 1378-79].

In Eliason v. Watts, 615 P.2d 427 (Utah 1980), cited by Brown's, the parties entered into a written earnest money agreement

for the purchase by plaintiff on one unimproved lot for $30,000.00 and for an option on an adjacent lot. Plaintiff made a $100.00 down payment and tendered a cashier's check for the balance of $29,900.00. The defendant refused to sell. The Supreme Court merely held that the contract was enforceable because it was definite and certain in its essential terms.

Incredibly, Brown's next contends that Pingree no longer reflects current law because it referred in its decision to a majority rule about "agreements to agree" and therefore the Utah Supreme Court's decision in Cottonwood Mall and Tsern, which "uncritically cited Pingree without considering new laws and legal doctrines" should be ignored by this Court. This argument is fatuous.

The Utah Supreme Court in its decision in Pingree did not blindly follow any "majority rule." It reached its decision based upon a well-reasoned analysis of the applicable law and policy considerations. The same is true of the Supreme Court's decisions in Cottonwood Mall and Tsern. The Supreme Court's 1996 decision in Tsern readopting the very same legal analysis and principles as adopted in Pingree, Cottonwood Mall and other earlier decisions lays bare Brown's argument that the Supreme Court's prior decisions rejecting Brown's position should be ignored.

Brown's assertion that the majority of courts now enforce agreements to agree is wrong. While there certainly is a split of authority on this issue and a number of cases have enforced agreements to agree based upon the particular facts of those cases

(usually where the parties have agreed to a "reasonable rent"). That is not a "majority rule." Most courts flatly refuse to enforce such agreements or refuse to enforce them unless there is a mechanism for determining the rent. See, Riis v. Day, 613 P.2d 696, 697-98 (Mont. 1980); Joseph Martin Jr. Deli, Inc. v. Schumacher, 419 N.Y.S.2d 558, 559 (1979); Farnsworth on Contracts, § 3.29 at p. 219 (2d Ed. 1990).

Brown's argues that Utah appellate courts "routinely enforce 'agreements to agree,'" ignoring the consistent decisions to the contrary. [Appellants' Brief, p. 23]. Brown's would be correct if it added the word "not." The authorities cited by Brown's for the proposition that this court can enforce the BLP do not support that position at all.

Brown's miscites English v. Standard Optical Co., 814 P.2d 613 (Utah App. 1991). English has nothing to do with the issue in the present case. In English, the parties orally modified the rent due under a written lease which provided the rent was to be negotiated every thirty-six months. The tenant then actually paid the modified rent for a few months. The landlord admitted the oral agreement, but contended the oral agreement was unenforceable under the statute of frauds. This Court held only that the written lease agreement, together with rental checks that were accepted by the landlord, and the correspondence concerning the matter, were sufficient writings to satisfy the statute of frauds. This Court distinguished Pingree and Cottonwood Mall on the basis that the statute of frauds was not an issue in those cases.

Brown's reliance on this Court's decision in Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285 (Utah App. 1994), is similarly unavailing. In Republic, this Court held that the agreement to pay a reasonable fee for the sale of all the defendant's company stock was enforceable in light of the relationship between the parties, the fact that they had already agreed to a $250,000.00 commission if 22% of the stock was sold and because they had also sometime later agreed upon a fee of $450,000.00 if all the stock was sold to a party for approximately $35,000,000.00. This Court distinguished Pingree upon the basis that in Pingree the parties had not agreed to a "reasonable" rent. Moreover, to the extent Brown's attempts to interpret Republic as allowing this Court to set a "reasonable" rent, Republic would directly contradict the Utah Supreme Court's decision in Cottonwood Mall where the Utah Supreme Court refused to enforce an agreement for the payment of "reasonable" rent in order to renew a lease.

In Kier v. Condrack, 478 P.2d 327 (Utah 1970), cited by Brown's, the plaintiffs were given an option to purchase the seller's home for the sum of $23,500.00 "on payments and terms to be negotiated." When the buyer exercised the option, he offered to cash out the plaintiffs by paying their equity and assuming the balance on two mortgages. Thus, the effect of the offer was to pay cash. The sellers rejected the offer, made it clear that they would not take cash, and attempted to bargain for a higher price by inserting into the agreement a provision that they would retain occupancy of the house for one to two years.

Finally, Brown's attempt to rely on Valley Lane Corp. v. Bowen, 592 P.2d 589 (Utah 1979), is curious. In Valley Lane, the parties agreed that if they were unable to agree on renewal rent, the rent would be determined by appraisers based on fair market value. Thus, the parties agreed to a specific procedure by which the rent would be determined -- something that is entirely lacking in the BLP, but was many months later proposed by Brown's and rejected by 330 Partners.[4]

B. THE COURT PROPERLY DISMISSED BROWN'S CLAIM TO SPECIFIC PERFORMANCE.

A claim for specific performance is equitable in nature and is to be decided by the court. Judge Brian determined as a matter of law that the BLP was too vague and indefinite for him to order specific performance. He further refused to order specific performance on the basis that the tenants occupying the Property had not been joined as parties. [R. 1424]. Judge Brian's decision was entirely correct.

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[4] Brown's also asks this Court to borrow from the provisions of Section 78A-2-305 of the Utah Uniform Commercial Code which provides that under certain conditions a court can determine a reasonable price for the sale of goods where the parties are unable to agree on the price. However, as Brown's concedes, the Uniform Commercial Code has absolutely no applicability to a lease of real estate. There is no basis for this court to "analogize" the provision of the UCC to a real estate lease, especially in view of the repeated decisions of the Utah Supreme Court specifically rejecting Brown's position that this Court can set reasonable rent during the option periods.

1. As a Matter of Law the BLP Was Too Indefinite.

The legal principle that the terms of an agreement must be clear, definite and certain set forth above applies with special force when the extraordinary relief of specific performance is sought. Candid Productions v. International Skating Union, 530 F.Supp. 1330 (S.D.N.Y. 1982). In Pitcher v. Lauritzen, 423 P.2d 491, 493 (Utah 1967), the Utah Supreme Court set forth the following requirements for specific performance:

> The contract must be free from doubt, vagueness, and ambiguity, so as to leave nothing to conjecture or to be supplied by the court. It must be sufficiently certain and definite in its terms to leave no reasonable doubt as to what the parties intended and no reasonable doubt of the specific thing equity is called upon to have performed, and it must be sufficiently certain as to its terms so that the court may enforce it as actually made by the parties. A greater degree of certainty is required for specific performance in equity than is necessary to establish a contract as the basis of an action at law for damages. [Emphasis added].

See also, Southlands Corp. v Potter, 760 P.2d 320, 322 (Utah App. 1988); Eckard v. Smith, 527 F.2d 660, 662 (Utah 1974) ("specific performance cannot be granted unless the terms are clear, and that clarity must be found from the language used in the document."); Barnard v. Barnard, 700 P.2d 1113, 1114 (Utah 1985); Pitcher v. Lauritzen, 423 P.2d 491, 493 (Utah 1967).

Because the BLP did not specify the rental during the option periods, did not specify the lease commencement date and did not contain an agreement on all of the other terms discussed above customarily found in a long-term commercial lease upon which the

parties were eventually unable to agree, the court's decision to dismiss the specific performance claim was entirely correct.

Brown's cites the court to Birdzell v. Utah Oil Refining Co., 242 P.2d 578, 580 (Utah 1952), as proof that the agreement in the present case is definite enough to be specifically enforced. Birdzell, however, directly refutes Brown's position. In Birdzell, the court ruled the purported agreement was not definite enough to be enforced because the letter relied upon as the agreement:

> . . . does not state what amount the rent shall be but expressly leaves that question open for further negotiations. In an oral contract to execute a lease for a period longer than one year, the amount of rent is clearly one of the essential terms which must appear in a memorandum.

[242 P.2d at 580].

Nor does Bunnell v. Bills, 368 P.2d 597 (Utah 1962), support Brown's position. In Bunnell, the Court simply held that the parties had indeed reached agreement on all the terms of the contract.

Brown's asserts that it was error for Judge Brian to dismiss its equitable claim for specific performance before the jury ruled on Brown's legal claim for damages based on common facts. [Appellants' Brief, p. 46]. Brown's mistakenly argues that because Judge Brian was going to allow the issue of whether the BLP was enforceable with respect to the initial three-year term of the lease to go to the jury before he decided as a matter of law whether the BLP was sufficient for recovery of damages, that Judge Brian was obligated not to decide the specific performance claim

until the jury made its determination. This argument is wrong for two reasons.

First, as the cases cited above demonstrate, an agreement may be definite enough for the recovery of damages, but still too indefinite for specific performance. Thus, any decision the jury would make on damages would not be binding with respect to specific performance. It was purely a question of law for the court to decide whether the BLP was definite enough to justify specific performance. The interpretation of an unambiguous agreement is a question of law for the court to decide. The threshold question of whether a contract is ambiguous is also a question of law for the court. Brown v. Weis, 871 P.2d 552, 559 (Utah App. 1994). Even if a contract is ambiguous, the resolution of the ambiguity presents a question of law for the court, unless contradictory evidence is presented to clarify the ambiguity. Morris v. Mountain States Tel & Tel Co., 658 P.2d 1199, 1200-01 (Utah 1983); Overson v. United States Fidelity & Guaranty, 587 P.2d 149, 151 (Utah 1978).

There was no claim in the case at bar or tender of any evidence that the BLP was ambiguous, nor was any evidence tendered of any negotiations or discussions to clarify any purported ambiguities. Therefore, the interpretation of the BLP was purely a question of law for the court to decide. The court appropriately made that decision.

Second, this argument is moot because Brown's stipulated to the dismissal of its claim for damages for breach of the BLP.

Thus, there were no "common facts" to be decided by the jury at trial.

2. The Tenants Were Indispensable Parties.

Brown's contention that the court erred in refusing to grant specific performance because of Brown's failure to join the present tenants on the Property is likewise without merit.[5] In McLean v. Archer, 201 P.2d 184, 189-90 (Wash. 1948), the court recognized the long-standing rule that parties whose rights will be directly affected by a decree of specific performance must be joined as parties if they are subject to the jurisdiction of the court. The court stated:

> The fundamental rule that all persons whose rights will be directly affected by a decree in equity must, if within the jurisdiction of the court and legally capable of suing or being sued, be joined as parties plaintiff or defendant in order that complete justice may be done and that there may be a final determination of the rights of all parties interested in the subject matter of the controversy governs the questions of parties in suits for specific performance.

See also, Wilson v. Thomason, 406 So.2d 871, 872 (Ala. 1981); Savin v. Rauch, 255 P.2d 206, 209 (Wyo. 1953); Beck v. Adams, 174 P.2d 134, 137-38 (Wyo. 1946); A.P. Freund Sons v. Vaupll, 202 N.E.2d

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[5] Although Brown's starts out its specific performance argument by acknowledging that one of the reasons the court dismissed the claim was that the BLP was too uncertain and indefinite to be enforceable, Brown's later inconsistently tells the court that Judge Brian only dismissed the specific performance claim because of the non-joinder of the tenants. [Appellants' Brief, p. 21]. Brown's disingenuously relies on a single excerpt from the June 11, 1996 hearing in which Judge Brian was exploring what to do with the specific performance claim. Judge Brian later made clear on the record of that hearing and in his Findings and Conclusions that the specific performance claim was dismissed, first, because it was too indefinite and uncertain, and, second, because of the non-joinder of the tenants. [R. 1294-96, 1424].

350, 352 (Ill. 1964). See also, 81A C.J.S. Specific Performance, § 136.

The only case cited by Brown's in support of its argument that the tenants were not indispensable parties is Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc., 546 F.2d 816 (8th Cir. 1977). Helzberg's is easily distinguished. There, the Court recognized that the tenant was required to be joined as a party if possible. However, the tenant was not subject to the personal jurisdiction of the court. Furthermore, the trial court had afforded the tenant an opportunity to intervene in the action to protect its interests. It was in that context that the Eighth Circuit held the district court had not committed error in proceeding in the absence of the tenant.

Brown's also argues that any dismissal for non-joinder should have been without prejudice. If Brown's contention is correct, then Brown's could have forced 330 Partners to go to trial on the damage claims and then have to come back for a second trial at a later time on the claim for specific performance. In this regard, Brown's did not seek leave to bring in the tenants as parties.

The only case cited by Brown's for its argument that the dismissal should have been without prejudice involved far different facts. In Bonneville Tower Condominium Management Comm. v. Thompson Michie Assocs., 728 P.2d 1017 (Utah 1986), cited by Brown's, the plaintiff filed a motion to dismiss the complaint for failure to join indispensable parties. The court ordered plaintiff

to amend its complaint to add the indispensable parties as defendants on two occasions and indicated that if the parties were not joined, the case would be dismissed. Plaintiff elected to stand on its complaint and the trial court then dismissed the action with prejudice. The dismissal was entered at the outset of the case, not at trial, as in the present case.

C. THE BLP DID NOT OBLIGATE 330 PARTNERS TO NEGOTIATE A LEASE IN GOOD FAITH.

Brown's contends that even if the BLP was not a binding lease, the document somehow gave rise to a covenant of good faith and fair dealing obligating Defendants to negotiate a lease in good faith. In other words, Brown's contends that the BLP was not an implied agreement to agree, but an implied agreement to negotiate! There is no basis for the implication of such a covenant.

In order for a covenant of good faith and fair dealing to exist, there must be a contractual relationship between the parties. Andreini v. Hultgren, 860 P.2d 916, 921 (Utah 1993). A covenant of good faith cannot create an agreement where none existed or supply terms to which the parties have not assented. Atchison Casting Corp. v. Dofasco, Inc., 889 F.Supp. 1445, 1457 (D.Kan. 1995). The courts have routinely held that unless and until a final agreement is reached, parties are free to break off negotiations at any time even if they have previously agreed to some of the terms of an agreement. See, e.g., Gasmark Ltd. v.

Kimball Energy Corp., 868 S.W.2d 925, 929 (Tex. App. 1994); McGinn v. American Bank Stationary Co., 195 A.2d 615, 616 (Mary. 1963).

Thus, in Trustee's of the First Pres. Church v. Howard Co. Jewelers, 97 A.2d 144, 146 (N.J. 1953), the court stated:

> It is a well-established principle of contract law that . . . until the actual completion of the bargain, either party is at liberty to withdraw his consent and put an end to the negotiation. . . .
>
> From all the circumstances it seems reasonably clear that both parties considered that many terms remained to be agreed upon despite the fact that the basic terms, the length of the lease and the amount of rent, had been definitely settled. It is common experience that the lease of a valuable piece of property such as this is never based solely upon the length of the term or rental alone, and until there is an agreement as to the other essential terms usually found in such a lease and ordinarily formalized in the writing, no binding contract exists.

In the case at bar, there is no express provision in the BLP whereby the parties obligated themselves to negotiate a lease in good faith. Brown's wants this court to imply such a provision into the document simply because the parties had reached a preliminary understanding on a few of the terms of the lease. The case law does not support such an implication. Indeed, even if the parties had agreed to negotiate in good faith, such an agreement would have been too vague and indefinite to be enforced. In Candid Productions v. International Skating Union, 530 F.Supp. 1330, 1336 (S.D.N.Y. 1982), the court granted summary judgment dismissing a claim that the defendant had breached an express agreement to negotiate in good faith because that agreement was too vague and indefinite to be enforced, observing:

> While the power of the Court to fashion in appropriate case an equitable remedy is great, it does

> not encompass the right to make an agreement for the parties. To issue a decree of specific performance, as plaintiff requests, would require the Court to enter into the realm of the conjectural. An agreement to negotiate in good faith is even more vague than an agreement to agree. An agreement to negotiate in good faith is amorphous and nebulous, since it implicates so many factors that are themselves indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise.

In Reprosystem B.V. v. SCM Corp., 727 F.2d 257 (2nd Cir. 1984), the Second Circuit refused to imply an obligation to negotiate in good faith. The Second Circuit held that because the parties did not intend to be bound to an agreement unless and until a formal written agreement was signed, there was no agreement between the parties and thus no obligation to negotiate a final agreement in good faith. The court stated that: "Whatever implied agreement that existed was too indefinite" for the court to enforce.

In the case at bar, if the court were to imply an obligation to negotiate in good faith, when were the parties obligated to start negotiations (they did not even do so for several months)? How long would Brown's have to wait for 330 Partners to complete the plans for the building, obtain governmental approvals for the building, obtain financing for construction and obtain a construction contract so that Brown's would have a reasonable idea of when the building would be finished before Brown's was freed of its obligation to negotiate and free to pursue other properties? How long would negotiations have to last; would the parties have to agree on reasonable terms with

respect to all of the matters that had not been agreed upon, or were the parties free to negotiate whatever terms they could, as in normal contract negotiations? Were the parties free to negotiate more favorable terms on certain provisions to compensate for concessions made on other provisions in the lease? These and many other similar questions counsel against the implication of an implied covenant to negotiate in good faith in the present case.

Brown's relies upon Channel Home Centers v. Grossman, 795 F.2d 291 (3rd Cir. 1986), to support its claim that 330 Partners was obligated to negotiate the remaining lease terms in good faith. Grossman is, however, distinguishable because in that case the landlord unambiguously agreed in writing to "withdraw the store from the rental market and only negotiate the above-described leasing transaction to completion." The court held that this constituted an enforceable express obligation to negotiate in good faith and therefore the landlord's failure to negotiate and his entering into a lease with a third party constituted a breach of that obligation.

Brown's once again cites Kier v. Condrack, supra, for its good faith argument, arguing that it establishes "an extraordinary duty to negotiate missing terms in agreements in good faith." Kier does no such thing. Kier only establishes that if a buyer has an option to purchase property for a specific sum "on payments and terms to be negotiated," the seller cannot refuse to sell just because he has decided not to when the buyer is willing to pay the entire option price in cash.

Most importantly, Brown's good faith argument flies in the face of the Utah Supreme Court's decisions in Pingree, Cottonwood Mall and Tsern that a court will not imply a reasonable rental rate to renew or modify leases. And, contrary to Brown's argument, there is no indication in Pingree, Cottonwood Mall or Tsern that the parties had already engaged in good faith negotiations.

D. 330 PARTNERS DID ATTEMPT TO NEGOTIATE A LEASE IN GOOD FAITH.

Even were the Court to rule on some basis that 330 Partners had an obligation to negotiate in good faith for a final lease, the evidence demonstrates that 330 Partners did so.

It was undisputed that all of the negotiations between the parties for a lease were in writing. Those negotiations took place during the latter part of 1994 and early 1995. 330 Partners submitted a proposed lease to Brown's. Brown's attorney, Thomas Green, then wrote his October 27, 1994 letter demanding over thirty changes in the lease. 330 Partners agreed to some of the changes, but refused others. Then, in the spring of 1995, Brown's submitted a proposed lease to 330 Partners. However, the parties were unable to agree on the terms of the lease and negotiations terminated. Brown's conceded that many of these items were normal disagreements between a landlord and tenant. [R. 917-44, 964-81].

Brown's contention that 330 Partners did not negotiate in good faith is based upon nothing more than the fact that 330

Partners did not consider the BLP to be binding and that 330 Partners wanted the BLP signed for financing purposes. Brown's expert testified, however, that is the normal purpose for such a document and that 50% of the time such documents don't result in a final agreement between the parties. [R. 958-59, 961].

E. AS A MATTER OF LAW, BROWN'S SUFFERED NO DAMAGES AS A RESULT OF DEFENDANTS' ALLEGED FAILURE TO NEGOTIATE IN GOOD FAITH.

In addition to the fact that no implied obligation to negotiate in good faith existed, Defendants were entitled to judgment as a matter of law on the good faith and fair dealing claim because, even if it is assumed for argument that Defendants were obligated to negotiate a lease in good faith and failed to do so, Brown's suffered no damage from that failure as a matter of law.

As set forth above, Brown's specifically stipulated at trial that Tom Brown's testimony that he would not have agreed to lease the Property for only three years and that he required a lease of at least two option periods of three years each was true testimony and accurately stated Brown's position in this lawsuit. Based upon that stipulation, Brown's moved for a dismissal of its claim for breach of the BLP for the initial three-year term. [R. 1267-1269]. Moreover, once again, Tom Brown testified that Brown's would not have entered into a lease unless 330 Partners agreed to all of the more than thirty changes demanded by Brown's counsel in

October, 1994, including a provision that set the percentage rental during the option periods. Brown's thus was unwilling to comply with the specific provision of the BLP which only obligated 330 Partners to agree on the rent in the option periods prior to the commencement of each option period.

Accordingly, even if 330 Partners would have acceded to every demand made by Brown's except the demand to agree in advance to the rental to be paid during the option periods, which 330 Partners was plainly not obligated to do, Brown's would not have entered into a lease. Simply put, Brown's itself was not willing to live with the BLP. Therefore, any supposed failure of 330 Partners to negotiate in good faith caused Brown's no damage.

F. <u>THE TRIAL COURT CORRECTLY DISMISSED BROWN'S GENERAL OFFICES CLAIMS TO RECOVER MONEY THAT IT ALLEGEDLY WOULD HAVE EARNED UNDER A SERVICES AGREEMENT WITH THE PARTNERSHIP TENANT</u>.

The trial court correctly found that:

> 15. Brown's General Offices was not a named signatory to the Basic Lease Provisions document, was not intended to be named signatory to any final lease agreement, if any could be reached, nor was it to be a tenant in the subject building. [R. 1422].

Brown's has not challenged that finding. Based on this finding, the court determined that as a matter of law Brown's General Offices' claim (asserted for the first time in a damage study prepared and served shortly before trial) that it was entitled to recover damages based upon a management agreement it

allegedly would have entered into with the proposed tenant, the Brown's Shoe Fit partnership, was barred as a matter of law. This ruling was perfectly correct. If 330 Partners were liable at all (which it is not), it would be liable to the tenant partnership not to the individual partners.

In the first place, there was no allegation of this item of special damages in Brown's Complaint. Special damages must be pled in the Complaint to be recoverable. Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979).

In the second place, there is absolutely no evidence or claim that Brown's General Offices, Inc. was a third party beneficiary of the BLP.

Brown's attempts to argue that Brown's General Offices was in privity with 330 Partners because it was a partner in Brown's Shoe Fit Company and therefore can recover whatever damages it suffered as a result of a supposed breach of the BLP. Brown's General Offices, however, was not a party to the BLP. The cases cited by Brown's do not support this contention.

Brown's first cites Cottonwood Mall Company v. Sine, supra, for the proposition that "partners are entitled to enforce a partnership contract with a third party." [Appellant's Brief, p. 45]. All Cottonwood Mall held was that a joint venture could sue in its own name to recover possession of space in its shopping mall occupied by the defendant.

Brown's next miscites Haynes v. Therrien, No. L-89-306, 1990 Ohio App. Lexis 4494*7 (Ohio App. 1990), and In Re Camhi,

208 N.Y.S. 2d 162 (1960), for the proposition that "partners are considered to be in privity of contract with the third party, since partners are both liable for the contractual duties, and entitled to enforce its obligation." [Appellants' Brief, p. 45]. Neither case has any significance to the issue under review in the present case. In Haynes, the Court only held that a consent judgment in a prior real property forfeiture action with respect to real estate purchased by a partnership was entitled to collateral estoppel effect in a later case filed by a partner in the partnership who was in privity with the partnership. In Camhi, the Court merely held that a partner was bound by an arbitration clause in an agreement signed by the partnership even though he had not personally signed the agreement.

Brown's also miscites Kemp v. Murray, 680 P.2d 758 (Utah 1984), for the proposition that "where one partner has suffered damages distinct from those of the partnership or other partners, that partner can recover those damages in addition to those incurred by the partnership or other partners." [Appellants' Brief, p. 46]. Kemp stands for no such proposition.

In Kemp, plaintiff, who was an individual member of a joint venture, commenced suit for interference with contract and prospective economic advantage and breach of contract to recover his 15% share of the damages suffered by the joint venture. This Court held that an individual joint venturer may not sue in his own name to enforce a liability owed to the joint venture and therefore affirmed the dismissal of the compliant for failure to join an

indispensable party. This court did not hold that a partner can sue for injuries he suffers as a result of a breach of contract with the partnership. The Court only noted, in dicta, that plaintiff could not sue directly unless he "could show that he suffered direct injury personally, as distinguished from injury to the partnership. . . ." [680 P.2d at 760].

Finally, there was not even any contention in this case that Brown's gave 330 Partners notice of any special circumstances that Brown's General Offices would enter into a management contract for which it would be paid service fees. Thus, even if such damages could otherwise be recovered by Brown's General Offices, the damages are not recoverable because they were not a foreseeable result of the alleged breach of the BLP. See, Saunders v. Sharp, 840 P.2d 796, 809 (Utah 1992).

G. THE COURT PROPERLY MADE FINDINGS OF UNDISPUTED FACT.

Brown's argues that Finding No. 12 is an improper finding of undisputed fact. That finding states:

> 12. During the fall of 1994 and early 1995 the parties exchanged correspondence and drafts of proposed lease agreements for the Property, but no final lease agreement was ever agreed to or entered into between the parties. In this connection, Plaintiffs requested a provision in the lease which, unlike the Basic Lease Provisions document, provided a mechanism for appraisers to set the rent during the option periods if the parties could not agree. [R. 1421-1422].

Brown's claims that it was error for the court to make this determination based upon the parties' trial briefs, arguments of counsel and the stipulation of Tom Brown's testimony contained in Finding No. 14. This argument does not accurately reflect the record.

330 Partners had previously filed a motion for summary judgment referring extensively to the deposition testimony of Tom Brown and his attorney, Thomas Green. That motion and the portions of those depositions were part of the record in this case at the time of trial. The testimony of Tom Brown and his attorney, Thomas Green, fully support Finding No. 12. Indeed, the negotiations between the parties were all conducted in writing and copies of the correspondence and proposed leases exchanged between the parties were attached as exhibits to Brown's Complaint. [R. 2-66]. Thus, there could be no dispute as to what the negotiations were. Green received a draft lease from 330 Partners' attorney and then demanded in his October 27, 1994 letter over thirty changes to that document. Tom Brown testified he would not enter into a lease unless all of those changes were made. Moreover, in early 1995, Brown's submitted its own proposed lease agreement which, contrary to the specific provisions of the BLP, contained a mechanism for appraisers to set the rent during the option periods if the parties could not agree. [R. 3, ¶ 13.5]. These facts were before the court in the form of admissions of the Brown's representative in deposition testimony and undisputed documents and the court's finding based thereon was perfectly proper.

In this connection, all parties understood that the hearing on June 11, 1996 at the commencement of trial would effectively be a motion for summary judgment. Thus, on June 6, 1996, at a previous hearing on the legal issues, the following exchange occurred between counsel and the court:

> The Court: . . . If there is going to be matters after carefully reviewing the law that clearly fall within the purview of the court to decide, as opposed to the jury, then it is this court's feeling that we ought to make those decisions, whatever they may be, and proceed only with factual matters for the jury to decide. I would suggest that you -- if you think there is any other law more persuasive than what you have cited in your pleading thus far, give it to me before the weekend, so I can read it. And I would like to have two hours of argument on the questions Tuesday, June 11th.
>
> . . .
>
> Mr. Van Dam: Sounds like what we are going to be doing is kind of arguing summary judgment on Tuesday. We have had very little time. We never researched nor responded to their motion for summary judgment. In the context of trying to prepare for this trial that's an enormous burden on us.
>
> Mr. Burbidge: I got to tell you, I have seen the briefs everybody has filed. Everybody is on top of that issue. They have drafted their jury instructions. So both of these sides have researched the cases, understand the cases, have drawn their jury instructions. There won't be any surprises on the cases or the argument. We are ready to go. Both sides are ready to go.
>
> The Court: I am inclined -- and careful reflection -- I am inclined to spend a couple of hours. I will be very familiar with all of the law that's cited. And we will see where this summary judgment argument, if that's what you want to label it, takes us Tuesday morning. [R. 1569-1570] [Emphasis added].

The court's action in deciding the legal issues at the commencement of trial was perfectly proper. Crucially, Brown's has not appealed on the basis that the court had no authority to

conduct such a hearing at the commencement of trial. Such an argument would have been groundless. The court was perfectly entitled to make legal decisions at the commencement of trial, just as the court would have been entitled to grant judgment based upon Brown's opening statement or to grant a directed verdict at the conclusion of Brown's case.

Moreover, any irregularity in this procedure was harmless. In Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991), the court granted a summary judgment that was filed four days before trial (one business day) and heard the morning of trial. The opposing party had not even had the chance to file an opposing memorandum. The court held that although Rule 56 was not followed, any error was harmless because there was no showing of a likelihood of a different outcome if Rule 56 had been followed. See also, Timm v. Dewsnup, 851 P.2d 1178, 1181 (Utah 1993); Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187 (Utah App. 1993).

In the present case, the parties had fully briefed all the legal issues, both in their trial briefs and in memoranda filed with the court with reference to the specific hearing. There has not been and could not be any showing of a likelihood of a different result. The court's decisions were based upon undisputed documents and Brown's own testimony. Moreover, Brown's did not request additional time in order to brief any issues or file affidavits, but participated in the June 11, 1996 hearing at the commencement of trial. Indeed, in that hearing, Brown's obtained

the dismissal of the claims asserted by 330 Partners in its Counterclaim.

H. THE COURT PROPERLY DISMISSED BROWN'S FRAUD CLAIM.

The trial court found that both parties contemplated that before Brown's occupied the Property a final lease document would be executed and the terms agreed to in the BLP would be incorporated into that document. [Finding No. 5]. The court concluded as a matter of law that Brown's fraud claim was insufficient because: (1) there was no misrepresentation of a presently existing fact; (2) Brown's could not reasonably rely on the claimed misrepresentation; and (3) Brown's suffered no damages as a result of the claimed misrepresentation. The court's ruling is perfectly appropriate under the applicable law and the record in this case.

In the first place, the supposed fact that was misrepresented was 330 Partners' failure to disclose to Brown's that it allegedly had no intent to be bound by the BLP. However, the BLP specifically provides that the parties are going to attempt to negotiate a final lease agreement containing all of the terms of a lease and that the terms of the BLP would simply be incorporated into that document. As demonstrated earlier, neither side intended to be bound unless and until a final lease was signed. There was no basis for any contention that at the time the BLP was entered into that 330 Partners did not intend to

attempt to negotiate a final lease incorporating the terms. The fact that 330 Partners may have intended to use the BLP to obtain financing is irrelevant. Brown's was well aware of that fact. Brown's own expert opined that is the normal purpose of such a document and that 50% of the time such preliminary documents do not result in a final agreement.

Moreover, as a matter of law, Brown's could not reasonably have relied upon the claimed misrepresentation, both because the terms of the BLP were too vague, uncertain and incomplete to permit such reliance and because of Tom Brown's testimony that Brown's would not have leased the Property pursuant to the terms of the BLP. Again, Tom Brown specifically testified that without binding agreements for the two three-year option periods, he would not have leased the Property. As demonstrated above, and as found by the court, no binding agreement for the option periods existed.

Third, for the same reason, Brown's suffered no damages as a result of the alleged fact that 330 Partners did not intend to be bound by the BLP. See, e.g., Hickman v. Groesbeck, 389 F.Supp. 769, 779 (D. Utah 1974); Mackey & Assoc. v. Russell & Axon Intern., 819 S.W.2d 49, 51 (Mo. App. 1991). Brown's itself did not intend to be bound by the BLP. Brown's was unwilling to leave the option periods' rent to future negotiation as provided in the BLP.

I. THE TRIAL COURT ERRED IN DISMISSING 330 PARTNERS' COUNTERCLAIM FOR ABUSE OF PROCESS.

330 Partners asserted a Counterclaim for abuse of process. Brown's filed this lawsuit claiming breach of the BLP despite the fact that Brown's knew it was not willing to abide by the terms of the BLP (such as they were) because Brown's knew it was not willing to lease the Property for the initial three-year term unless Brown's had a firm agreement as to the rent to be charged during the two three-year option periods. Brown's filed this lawsuit for the purpose of attempting to force Defendants into either leasing the Property to Brown's on terms to which 330 Partners had not agreed (not under the terms of the BLP) and to which 330 Partners was not obligated to agree, or to pay Brown's blood money to settle the lawsuit.

The use of legal process to accomplish an improper purpose, such as compelling a person to do so something which he would not otherwise be legally obligated to do, constitutes an abuse of process. Crease v. Pleasant Grove City, 519 P.2d 888, 890 (Utah 1974); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 308-09 (Utah 1982); Keller v. Ray, Quinney & Nebeker, 896 F.Supp. 1563 (D. Utah 1995). An action for abuse of process may be brought as a counterclaim. Keller, 896 F.Supp at 1570, n. 15; Smith v. Buicich, 699 P.2d 763 (Utah 1985). The evidence that this case was filed for an improper purpose was sufficient to require that this claim be decided by the jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the trial court dismissing Brown's Complaint should be affirmed in all respects. The Order dismissing Defendants' Counterclaim should be reversed and that claim remanded for trial.

DATED this 16th day of July, 1997.

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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed two copies of the within to the following parties by depositing the same in U.S. mails, postage prepaid, this 16th day of July, 1997:

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